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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UCAR TECHNOLOGY (USA) INC., a
California corporation, and UCAR INC., a
Chinese corporation,

Plaintiffs,

v.

YAN LI, an individual; HUA ZHONG,
an individual; DA HUO, an individual;
and ZHENZHEN KOU, an individual,

Defendants.

Case No. 5:17-cv-01704-EJD

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Hearing Date: Sept. 7, 2017

Time: 9:00 a.m.

Courtroom: 4

Hon. Edward J. Davila

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I. INTRODUCTION

Defendants have admitted destroying UCAR property and taking UCAR proprietary information. They left their secret research and development positions at UCAR that involved trade secrets regarding self-driving vehicles. Prior to doing so, they agreed to help start up a competing company in the same field. When confronted that they were planning to take UCAR confidential information to the competitor, they did not dispute the accusation, a tacit admission that they were in fact planning to do so. They destroyed all the data on their laptops as they left. They took the administrative rights to access UCAR servers with them, and what work product they left behind was indecipherable. They admitted that they took vast amounts of UCAR trade secret information from UCAR even after they resigned, as well as security access badges and other company property. Not only is the Complaint well-founded, Defendants have already admitted facts showing they are liable.

Defendants' motion is not based on the facts as pled in the Complaint, but instead on their own version of facts viewed in the light most favorable to them, thereby employing the *opposite* of the correct legal standard on a motion to dismiss. Properly viewed as pled, and with inferences drawn in UCAR's favor as required by law, it is clear the motion to dismiss is without merit, and it should be denied in its entirety. Alternatively, leave to amend is liberally granted, and were the Court to agree with Defendants as to any of the claims in the Complaint, UCAR should be permitted to amend those claims.

II. LEGAL STANDARDS**A. Rule 12(b)(6) Motions to Dismiss Test the Legal Sufficiency of the Complaint, Drawing All Inferences in Favor of UCAR**

In ruling on a Rule 12(b)(6) motion, the Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A motion to dismiss under Fed.R.Civ.P. 12(b)(6) tests the legal sufficiency of a complaint. *Strom v. U.S.*, 641 F.3d 1051, 1067 n.17 (9th Cir. 2011) (citing *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987)); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). The court may dismiss based on a lack of a cognizable legal theory, or the absence of

1 sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d
2 696, 699 (9th Cir. 1990).

3 To defeat a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a plaintiff need only allege
4 sufficient facts “to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*
5 *Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim has facial
6 plausibility “when the plaintiff pleads factual content that allows the court to draw the reasonable
7 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,
8 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The plausibility standard does *not* mandate that
9 the pleading meet the level of probability. *Id.*

10 **B. Defendants’ Attempt to Rely on Facts to Contradict the Pleadings Is Improper**
11 **and Should Be Denied**

12 It is improper to inject alleged, self-serving facts into a motion to dismiss, but that forms the
13 core basis of Defendants’ motion.¹ Defendants wrongly rely on facts stated in their own
14 declarations, a notion that has been repeatedly rejected by courts. The facts asserted by Defendants
15 to support their motion have not been subject to any scrutiny because discovery has not yet begun
16 in this case, no documents have been exchanged, and no depositions taken. Defendants note that
17 under Federal Rule of Evidence 201, courts may take judicial notice of facts that are “not subject to
18 reasonable dispute.” However, they neglect to provide the proper law regarding what would allow
19 for judicial notice under this rule.

20 Facts are indisputable, and thus subject to judicial notice, *only* if they are either “generally
21 known” under Rule 201(b)(1) or “capable of accurate and ready determination by resort to sources
22 whose accuracy cannot be reasonably questioned” under Rule 201(b)(2). **Facts about events in**
23 **declarations “do not remotely fit the requirements of Rule 201.”** *United States v. Ritchie*, 342
24 F.3d 903, 909 (9th Cir. 2003). “A high degree of indisputability is an essential prerequisite for a

25 ¹ Defendants also filed a request for judicial notice. UCAR does not object to that request,
26 because Defendant did not request judicial notice of their own declarations. However, their
27 motion relies extensively on representations of fact from their own declarations. While
28 admissions in those declarations may be used against Defendants pursuant to the same law
cited by Defendants in their request for judicial notice, their own self-serving statements
cannot be used to support a motion to dismiss the Complaint. In contrast, the statements made
in the Qian and Zhang declarations (that are the subject of the judicial notice request) merely
provide more detailed support for UCAR’s claims and provide additional facts that support
denial of the motion.

1 court to take judicial notice of a particular fact.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F.
 2 Supp. 3d 1011, 1031 (C.D. Cal. 2015) (quoting Advisory Committee notes to Rule 201). “Courts
 3 regularly decline to consider declarations and exhibits submitted in support of or opposition to a
 4 motion to dismiss” when they constitute evidence not incorporated into the complaint by reference
 5 or a proper subject of judicial notice. *Id.*, at 1021; *see also City of Royal Oak Retirement System v.*
 6 *Juniper Networks, Inc.*, 880 F.Supp.2d 1045, 1060 (N.D. Cal. 2012) (granting motion to strike fact
 7 declaration filed with motion to dismiss); *Sepehry-Fard v. elect Portfolio Servicing, Inc.*, 2016 U.S.
 8 Dist. LEXIS 112542, *15, 2016 WL 4436312 (N.D. Cal. Aug. 23, 2016) (affidavits not appropriate
 9 for judicial notice); *Ahdom v. Lopez*, 2016 U.S. Dist. LEXIS 125202, *3 (E.D. Cal. 2016)
 10 (declarations not appropriate for judicial notice). “The general prohibition against looking at matters
 11 beyond the complaint to resolve a Rule 12(b)(6) motion ensures that parties have adequate notice to
 12 present additional evidence and establish whether there are any genuine issues of material fact to be
 13 resolved.” *de Fontbrune v. Wofsy*, 2016 U.S. App. LEXIS 20416 *16 (9th Cir. Nov. 14, 2016).
 14 Additionally, declarations that are not referenced in a complaint are considered beyond the scope of
 15 the complaint and cannot be considered in furtherance of a motion to dismiss. *See Gerritsen*, 112 F.
 16 Supp. 3d at 1021 (collecting cases holding that declarations of fact cannot be considered on motions
 17 to dismiss).

18 **C. Leave to Amend Is Liberally Granted, Especially When the Complaint Has Not**
 19 **Previously Been Amended**

20 The Federal Rules of Civil Procedure provide that the Court should “freely give leave [to
 21 amend] when justice so requires.” Fed.R.Civ.P. 15(a)(2). The Ninth Circuit, and the district courts
 22 within the Ninth Circuit, apply this policy favoring amendment be applied with “extreme
 23 liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).
 24 “Absent prejudice, or a strong showing of any of the remaining [] factors,² there exists a
 25 *presumption* under Rule 15(a) in favor of granting leave to amend.” *Id.* at 1052 (emphasis in

26 ² A court considers five factors in determining whether to grant leave to amend: “(1) bad faith,
 27 (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether
 28 plaintiff has previously amended his complaint.” *In re W. States Wholesale Nat. Gas Antitrust*
Litig., 715 F.3d 716, 738 (9th Cir. 2013) (quotation omitted). Of these factors, the
 consideration of prejudice carries the greatest weight. *See Eminence Capital, LLC v. Aspeon,*
Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). Here, at the earliest stage of the case and before
 discovery, there can be no legitimate claim of prejudice.

original). “[D]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 879 (9th Cir. 1999). “Denials of motions for leave to amend have been reversed when lacking a contemporaneous specific finding by the district court of prejudice to the opposing party, bad faith by the moving party, or futility of amendment.” *Mendia v. Garcia*, 165 F. Supp. 3d 861, 873 (N.D. Cal. 2016) (*quoting DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87 (9th Cir. 1987)). The Court should even more liberally grant leave to amend a complaint that has not previously been amended. *See Mendia*, at 874; *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, 2017 U.S. Dist. LEXIS 70115, *15-16 (N.D. Cal. 2017). Accordingly, UCAR should be granted leave to amend, if necessary.

III. BACKGROUND FACTS

UCAR is one of the largest car-hailing services and technology platforms in China. (Complaint, ¶ 14.) Like Uber and Lyft in the United States, UCAR provides a platform in China for ride-hailing to millions of people who use UCAR apps on iPhones and Android-enabled smart phones or use the UCAR website. UCAR is a technology company whose competitive advantage is based on its ability to continue to innovate. (Declaration of Zhiya Qian [“Qian Dec.”] [Dkt. 6-4], ¶ 3.) Some of its most mission critical projects include its ride-hailing software and analysis of large data sets related to vehicles in transit. (*Id.*; *see also* Complaint, ¶ 14.)

To advance its technology, especially related to big data analysis, UCAR hired Defendants as a team of research and development engineers for UCAR’s Silicon Valley office. (Complaint, ¶¶ 15-18; Qian TRO Dec. [Dkt. 6-4], ¶ 4.) Over time, the team began to work on important technological advances related to development of next-generation auto-pilot technologies. (Complaint, ¶¶ 22-23; Qian TRO Dec., ¶ 4-7.) Defendants spent approximately one-and-a-half years and collectively received hundreds of thousands of dollars from UCAR to work on the company’s trade secret technology development. (Complaint, ¶ 1; Qian TRO Dec., ¶ 6.) What UCAR did not know was that Defendants were secretly setting the stage to steal UCAR’s proprietary information, and the proprietary work they had done for UCAR, to set up a competing venture of their own. (Complaint, ¶ 1.)

1 In March 2017, UCAR first learned that Defendants were considering leaving the company,
2 and then, on March 14, 2017, Defendants all abruptly resigned by email, taking UCAR's trade
3 secrets and intellectual property, copying this information to other computers or copying data to
4 local memory on non-UCAR computers through access to remote servers, reformatting their UCAR
5 company computers, and for a time denying UCAR administrative level access to its AWS account.
6 (Complaint, ¶¶ 1, 27-32, 35-43, 56-58, 64, 69.)

7 When confronted, Defendants admitted that their actions were the product of simple greed:
8 they had learned that if they took UCAR's property, it could support their new company and reap
9 economic benefits, so they did. (Complaint, ¶ 1.) UCAR sent Defendants cease and desist letters
10 demanding that Defendants give back all UCAR's trade secret information. Despite UCAR's
11 demands, Defendants did not give back to UCAR data they took. (Complaint, ¶¶ 1, 69.) Defendants
12 returned no data at all until *after* they were sued in this case, and even then, they destroyed vast
13 amounts of data instead of returning it as instructed. UCAR still has to take discovery as to
14 Defendants' retention of UCAR proprietary information.

15 UCAR filed its Complaint, along with a motion for temporary restraining order and
16 supporting evidence. (Dkt. 1 & 6 – 6-5.) The Court granted the TRO. (Dkt. 17.) Subsequently,
17 Defendants filed lengthy declarations that, as defense counsel himself characterized at the hearing
18 regarding the Court's order to show cause why a preliminary injunction, were aimed at "coming
19 clean." (Dkt. 31 – 31-34.) Those declarations, while admitting to certain misdeeds, obfuscate and
20 misrepresent others. Based on the representations by Defendants under oath, the Court discharged
21 the order to show cause, but in so doing agreed that the facts support several of the elements of the
22 claims asserted in the Complaint, holding, for example, the following:

- 23 - "[T]he court acknowledges that UCAR has a legitimate interest in protecting its
24 proprietary information from disclosure and that some of Defendants' conduct
25 raises valid concerns in this regard." (Dkt. 41, ¶ 8.)
- 26 - "[T]here is no dispute that Defendants reformatted their laptops when they left
27 UCAR, effectively erasing the data and records contained on the computer." (*Id.*, ¶
28 7.)
- "Mr. Li admits that he deleted certain UCAR files after having downloaded them to
his wife's computer..." (*Id.*)

- “Mr. Li admits to having logged on to UCAR servers after formally resigning from the company, admits to having downloaded (even if inadvertently) certain UCAR files, and admits to having deleted this information after realizing what it was.” (*Id.*, ¶ 8.)
- “There is also some evidence to suggest that Defendants may have retained or otherwise had in their possession (even if inadvertently) other UCAR data after having resigned from the company.” (*Id.*)
- “And there is no dispute that all Defendants joined a new startup company that could become a competitor to UCAR.” (*Id.*)³

Surprisingly, despite Defendants’ purported willingness to come clean, they now attempt to skirt responsibility through a motion to dismiss the Complaint in its entirety.

IV. THE CLAIMS IN THE COMPLAINT ARE WELL-FOUNDED AND NOT SUBJECT TO DISMISSAL

Defendants assert disputed facts (not permitted in making a motion to dismiss) and mischaracterize the record. In fact, UCAR has properly pled the claims set forth in the Complaint.

A. The Complaint Allegations and Submitted Evidence Support UCAR’s California Trade Secret Claim

1. Defendants’ Inevitable Disclosure Argument Is Misplaced

Defendants state, without any citation to the Complaint, that “Plaintiffs’ complaint alleges trade secret misappropriation based on an impermissible ‘inevitable disclosure’ theory.” (Mot., at 8.) This is at best a “straw man” argument, and it is simply false. The Complaint is based on a set of factual allegations that do not require reliance on inevitable disclosure.

Indeed, the Complaint alleges not simply that the Defendants would inevitably disclose trade secrets to work at a new company, but rather that they took tangible trade secret information, including at least proprietary database data and source code to use at the new company. (*See, e.g.*, Complaint, ¶ 1, 28-31, 36-42.) Beyond this, Defendants *admitted* that they did so. Their team leader conceded under oath that he downloaded more than 9,000 files from UCAR’s server after he

³ Defendants may argue that the Court found, based on the evidence of record, that there was insufficient evidence of a likelihood of immediate, irreparable harm from improper use of UCAR proprietary information going forward. However, that ruling—regarding a requested preliminary injunction—was based on an entirely different standard of review than for a Complaint, where all facts in the Complaint are deemed true and all inferences must be drawn in UCAR’s favor. *See Manzarek*, 519 F.3d at 1031. The Ninth Circuit has noted that that post-*Twombly*, a complaint need only present a claim for relief that is plausible, *not* probable. *United States v. Raya-Vaca*, 771 F.3d 1195, 1207 (9th Cir. 2014).

resigned from the company, and that he realized the files contained the UCAR’s proprietary information. The files themselves show that both types of files were present in the downloaded material. (Li Dec. [Dkt. 31-1, ¶¶ 133-139]; Holland Dec. [Dkt. 31-23, ¶¶ 15-21 & Ex. 2].) Li states that he subsequently deleted the files, but there is there no proof that no other copies exist, and his testimony is contradicted by forensic evidence.⁴ Thus, not only does the Complaint sufficiently plead trade secrets were taken, proof of this taking has already been submitted to the Court. Therefore, Defendants’ assertion that the trade secret claim is based purely on “inevitable disclosure” is far from the truth.

Also, the law relied upon by Defendants as holding the “inevitable disclosure” doctrine is no longer valid in California confirmed that the CUTSA permits injunctive relief against former employees for actual or *threatened* trade secret misappropriation. *See Schlage Lock Company v. Whyte*, 101 Cal. App. 4th 1443, 1456-58 (2002) (citing Cal. Civ. Code § 3426.2(a)). Here there is ample pleading of facts showing threatened disclosure. (*See, e.g.*, Complaint, ¶¶ 1, 28-31, 36-37.) “On information and belief, Defendants have disclosed, and intend to continue to disclose, UCAR trade secrets and confidential information to others, including their new company.” (Complaint, ¶ 39; *see also id.*, ¶¶ 48-49.) Defendants took UCAR’s proprietary files, and when confronted by UCAR’s COO, they did not dispute that they were taking UCAR material to use at a competing company. (Complaint, ¶ 31.) Yan Li admits this in his declaration, providing as an excuse that he did not want to contradict the COO but did not intend to base his work on UCAR data or work. But that is a disputed fact that requires a jury to assess Li’s credibility, and therefore cannot be used to avoid the claims on a motion to dismiss (or indeed a summary judgment motion). *Accord Royal Oak*, 880 F.Supp.2d at 1060 (witness fact testimony cannot be used to support a motion to dismiss a complaint); *Gerritsen*, 112 F. Supp. 3d at 1021 (collecting cases all holding that declarations of fact cannot be considered on motions to dismiss).⁵

⁴ *See, e.g.*, Maugeri Dec. [Dkt. 34-5, ¶¶ 14-24 (explaining how Defendants did not perform sufficient analysis to show that all copies of data were destroyed and not retained), ¶ 14 (explaining that Li’s and Holland’s testimony that Li only accessed UCAR data on March 14 is false and contradicted by the physical evidence)]; Huang Dec. [Dkt. 35-3 – 35-9 (showing that Li accessed UCAR servers multiple times subsequent to resigning, including after March 14)].

⁵ Yan Li’s credibility is highly questionable at best; it appears that he has already made multiple statements under oath that have proved to be false. His statement that he did not intend to use UCAR data is belied by the fact that after he resigned he downloaded more than

2. The Complaint and Submitted Evidence Supports UCAR's California Trade Secret Claim

California trade secret law is codified by the CUTSA. *See* Cal. Civ. Code §§ 3426-3426.11. "To state a claim under the California Uniform Trade Secrets Act, a plaintiff must plead facts sufficient to show that: (1) the plaintiff owned a trade secret; (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means; and (3) the defendant's actions damaged the plaintiff." *VasoNova Inc. v. Grunwald*, 2012 U.S. Dist. LEXIS 133380, *5 (N.D. Cal. Dec. 11, 2012) (*citing CytoDyn of N.M., Inc. v. Amerimmune Pharm., Inc.*, 160 Cal. App. 4th 288, 297 (2008)). Under the California Uniform Trade Secrets Act, 'trade secret' means "information, including a... compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). So long as UCAR pled facts supporting these legal requirements, there is no basis to dismiss the claims.

UCAR identified trade secrets in its complaint, including the following:

- a. Detailed proprietary data that UCAR collected from its network of more than 15,000 cars, which provided valuable insight into car operation and usage;
- b. The software and testing data related to auto-piloted cars developed by UCAR and the subsets of the larger data set usable for work on auto-pilot technology, as well as UCAR software developed to work with vehicle auto-pilot technology and the R&D work being done by Defendants for UCAR. (*See* Complaint, ¶ 25.)

9,000 files from UCAR's database onto a personal computer. He stated that he only accessed the UCAR database once, which has proven to be false according to Defendants' own forensic report as well as UCAR's server logs. (*Contrast* Li Dec., ¶ 140 with Dkt. 31-23 Ex. 2, Dkt. 34-5, ¶ 15 & Dkt. 35-3 – 35-9.) Li stated that he did not access the files on the MacBook between March 14 and 17, which was belied by the same evidence. (*Id.*) He also stated that he received a letter from UCAR's attorney on March 17 and deleted the UCAR files from the MacBook on March 17, but that was sheer coincidence and had nothing to do with each other, because in fact he suddenly came to the realization on his own that he had UCAR confidential information that he should delete, which is simply not believable. (*See* Li Dec., ¶ 139.) Also, UCAR has not yet had the opportunity to depose Defendants or take other discovery as to the various statements made in the declarations. Statements of fact made by Defendants in declarations cannot be taken at face value, especially on a motion to dismiss claims of a complaint.

Data compilations like the car usage data, which is voluminous and proprietary, not publicly available but collected by UCAR and maintained as confidential, are classically considered to constitute trade secrets. *See CBS Interactive v. Etilize, Inc.*, 2009 Cal. Super. LEXIS 2262, *11 (L.A. County Super. Dec. 10, 2009) (“data compilations, such as those identified by Plaintiff, are subject to protection as trade secrets.”). At UCAR, this data is protected and kept secret. (*See, e.g.*, Complaint, ¶¶ 1, 26, 35-36.) What is more, Defendants admitted that they understood this information to be proprietary to UCAR. (*See* Li Dec. [Dkt. 31-1], ¶ 139 [indicating that the reason he deleted more than 9,200 files he had downloaded from UCAR servers because he realized they included UCAR proprietary information].)

Additionally, research and development work, including queries on the UCAR database, software development, reporting, and other work done by the team on auto-pilot technologies, were matters maintained as confidential and trade secret by UCAR. Auto-piloting is a cutting-edge technological field, and the information developed by the R&D team was kept confidential. (*Id.*, ¶¶ 1, 14-27, 35-36; Qian TRO Dec. [Dkt. 6-4], ¶¶ 3-8; Qian PI Dec.[Dkt. 34-1], ¶¶ 3-7.) UCAR has plead facts showing that it has relevant trade secrets that the company took measures to protect as trade secrets. (*Id.*)

The other factors are easily established, because Defendants were the R&D team that had access to the UCAR database and performed the R&D work. (*Id.*) The fact they deleted all the data from their laptops, and prevented UCAR from denying them access to the AWS server for some time, is strong circumstantial evidence that they still have possession of that trade secret information. (*See, e.g.*, Complaint, ¶¶ 1, 27-32.) UCAR is being damaged because Defendants still could use that information to compete with UCAR even though they should not have it at all. (*Id.*, ¶¶ 32-33, 42-45, 49-54.)

State trade secret misappropriation clearly has been alleged in the Complaint. More than that, it is supported both by direct evidence via the tacit admission of Yan Li that the group was taking the information to use at the new company and the admission of downloading more than 9,000 files including company database and source code files. (Li Dec. [Dkt. 31-1, ¶¶ 133-139]; Holland Dec. [Dkt. 31-23, ¶¶ 15-21 & Ex. 2].) It also is supported by forensic evidence. (*Id.*) It is

further supported by circumstantial evidence, including that all Defendants destroyed all data from their laptops in a way that made the history of file transfer from those computers untraceable, the fact that they left the R&D in a state of disarray, that they took the administrative rights with them and did not provide UCAR with that information, and several other damning facts showing misappropriation of UCAR data and destruction of its property. (*Id.*; Complaint, ¶¶ 1, 27-32, 77; Maugeri Dec. [Dkt. 34-5], ¶¶ 14-24; Qian PI Dec. [Dkt. 34-1] ¶¶ 3-7.)

B. The Complaint Allegations and Submitted Evidence Support Federal Trade Secret Claim

Defendants' motion discusses state law trade secrets, but those have different requirements from UCAR's *federal* trade secrets claim. The federal Defend Trade Secrets Act (DTSA) provides a right to a civil action for relief for misappropriation of trade secrets: "An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). The federal law has its own requirements and does not have to meet CUTSA requirements. *Accord DTS Brand Energy & Infrastructure Servs. v. Irex Contr. Grp.*, 2017 U.S. Dist. LEXIS 43497 *9 (E.D. Pa. Mar. 23, 2017) (noting that there are differences between DTSA and the Uniform Trade Secrets Act used as the model by states).

Defendants' *only* assertion regarding the DTSA is that a claim under the statute cannot be based "merely on the information the person knows," citing 18 U.S.C. § 1836(b)(3)(A)(i)-(ii). However, the Compliant does not allege merely that the Defendants know of information. It alleges that the Defendants took proprietary trade secret database information obtained at great cost and effort by UCAR, and that they took UCAR proprietary source code and R&D information that Defendants developed specifically for UCAR. That is far more than "information the person knows." Beyond this, unlike CUTSA, the DTSA does not have specific requirements for pleading and proving trade secret misappropriation other than the fact Defendants misappropriated a trade secret. The same facts discussed above regarding the CUTSA claim more easily clear the bar for the federal DTSA claim. (*See, supra*, Sec. IV(A)(1)-(2).)

C. The Complaint Properly Pleads a Claim for Conversion

UCAR has asserted a claim for property conversion that is causing it ongoing damage. “To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.” *Moore v. Regents of the Univ. of Cal.*, 51 Cal.3d 120, 136 (Cal. 1990) (internal citations omitted). “[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner’s rights thereto constitutes conversion.” *Plummer v. Day/Eisenberg, LLP*, 184 Cal.App.4th 38, 50 (Cal. 2010). A cause of action for conversion can be based on either the taking of property or its intentional destruction or alteration. 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 710, 711, pp. 1034-1035 (Witkin Summary); *Fearon v. Department of Corrections*, 162 Cal.App.3d 1254, 1257 (1984); *Division of Labor Law Enforcement v. Siskiyou Mills*, 229 Cal. App. 2d 105, 110 (1964). “Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant’s good faith, lack of knowledge, and motive are ordinarily immaterial.” *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1066 (Cal. App. 1998) (internal citations omitted).

Defendants assert two arguments against UCAR’s claim for conversion, neither of which is well-founded. First, Defendants assert that the claim is preempted by the state trade secret theft claim. In so doing, Defendants again mischaracterize the law. Again, instead of analyzing the actual allegations of the Complaint, they respond to their own “straw man” argument. As held by all the cases cited by Defendants, a state law conversion claim may be preempted by a CUTSA claim, but **only** to the extent the two claims arise from the same facts. *See Avago Techs. U.S. Inc. v. Nanoprecision Prod., Inc.*, 2017 WL 412524, *8 (N.D. Cal. Jan. 31, 2017) (if the only property identified in the complaint is confidential or proprietary information . . . then a conversion claim **predicated on the theft of that property** is preempted.” (emphasis added)). Thus, if the only conversion or interference with property is the allegation that Defendants misappropriated trade secrets, that allegation cannot serve as the basis for a conversion claim. “However, state law claims

that rely on additional and different facts or theories of liability than those forming the basis for the trade secret claim are not preempted by the [C]UTSA. *See E-Smart Techs., Inc. v. Drizin*, 2009 U.S. Dist. LEXIS 272 at *19-20 (N.D. Cal. Jan. 5, 2009) (“To the extent that the unfair competition and conversion claims rely upon allegations of something other than misappropriation of trade secrets, those claims cannot be preempted by the UTSA.”).” *Amron Int’l Diving Supply, Inc. v. Hydrolinx Diving Commun., Inc.*, 2011 U.S. Dist. LEXIS 122420 *25-26, 2011 WL 5025178 (S.D. Cal. Oct. 21, 2011). Preemption is not triggered where the facts underlying an independent claim are “similar to, but distinct from, those underlying the misappropriation claim.” *Axis Imex, Inc., v. Sunset Bay Rattan, Inc.*, No. C 08-3931, 2009 U.S. Dist. LEXIS 2667, 2009 WL 55178, at *5 (N.D. Cal. January 7, 2009).⁶

Here, the Complaint makes several allegations that do not and cannot serve as the basis for trade secret theft, but establish well the elements of conversion. For example, Defendants destroyed all the information on the company laptops. (Complaint, ¶ 1, 30, 77.) That cannot be misappropriation, since it is the opposite of appropriating—it is destroying. Instead, the act meets the criteria for “interference with” UCAR’s ownership rights, supporting liability for conversion. *See Moore*, 51 Cal.3d at 136. Similarly, taking the administrative access rights when they left the company and not providing UCAR with the information needed to gain administrative access does not itself constitute trade secret theft; instead, it constitutes interference with UCAR’s ownership rights.⁷ (Complaint, ¶¶ 1, 27-32, 77.) Moreover, after the Complaint was filed, Defendants

⁶ “Moreover, Defendants’ motion to dismiss based on preemption cannot be addressed until it is determined whether the allegedly misappropriated information constitutes a trade secret.” *Amron*, at *27. “[C]ourts have held that the [*28] question of preemption cannot be addressed prior to determining whether the allegedly misappropriated information constitutes a trade secret.” *Id.*, at *28, citing *Genzyme Corp. v. Bishop*, 463 F. Supp. 2d 946, 949 (W.D. Wis. 2006); *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, 295 F. Supp. 2d 430, 437 (D. De. 2003); *Stone Castle Fin. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 658-659 (E.D. Va. 2002); *Combined Metals of Chicago Ltd. P’ship v. Airtek, Inc.*, 985 F. Supp. 827, 830 (N.D. Ill. 1997).

⁷ These facts show intentionality and provide circumstantial evidence of trade secret misappropriation, but that is entirely different than constituting trade secret misappropriation. The CUTSA claim is not based on destruction of UCAR property even though destruction of property also is circumstantial evidence showing an intent of Defendants to cover their tracks and avoid proof of trade secret theft. The key is that the claims must be based on the same nucleus of facts. Here they are not, because destruction of property does not give rise to a trade secret misappropriation claim. By way of analogy, if someone steals a painting from a homeowners’ house and then burns the house down to cover their tracks, the burning is not a theft even though there exists an overlap of facts for evidentiary purposes.

1 conceded in their filed declarations to this Court that they took various physical items from UCAR,
2 including USB drives, telephones, security access badges, and other items. (*See* Dkt. 31-1, 31-12,
3 31-15, 31-19.) These further support UCAR’s conversion claim. For the same reasons, the unfair
4 competition claim also is not preempted.⁸

5 Second, Defendants assert that conversion cannot apply to intangible property. This
6 argument is based on the same flaw, namely Defendants’ mischaracterization of UCAR’s claims as
7 being solely predicated on trade secret misappropriation, when they are not. The cases hold that
8 conversion cannot apply to “intangible intellectual property.” *See, e.g., Innospan Corp. v. Intuit,*
9 *Inc.*, 2011 U.S. Dist. LEXIS 29122, *8 (Mar. 8, 2011). Intellectual property includes trademarks,
10 patent rights, and trade secrets (intangible abstractions), but not the destruction of or denial of access
11 to actual computer files, which are physical. *See Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559
12 (1996) (computer files stored on a disk are tangible property that support a claim in California for
13 conversion); *see also, e.g., Angelica Textile Services, Inc. v. Park*, 220 Cal. App. 4th 495, 508 (2013)
14 (allegation of taking files constitutes tangible property and supports conversion claim); *Loop AI Labs*
15 *Inc v. Gatti*, 2015 U.S. Dist. LEXIS 117330, *10 (N.D. Cal. Sept. 2, 2015) (theft of computer and
16 computer files differs from trade secret misappropriation and supports conversion claim); *Keystone*
17 *Fruit Mktg. v. Brownfield*, 2007 U.S. Dist. LEXIS 22018, *6-7 (E.D. Wash. Mar. 14, 2007) (granting
18 motion to amend to add conversion claim based on taking of “computer data and files”).

19 Here, Defendants destroyed all the data on their UCAR laptops when they left. Each of the
20 Defendants was an employee of UCAR, and the data on those laptops was UCAR property.
21 (Complaint, ¶ 1, 30, 77.) “Everything which an employee acquires by virtue of his employment,
22 except the compensation which is due to him from his employer, belongs to the employer, whether
23 acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.”
24 Cal. Labor Code, § 2860. The protected data on the AWS servers, including the work product
25 created by Defendants while employed at UCAR, is similarly UCAR property. Yet, for some time,
26 Defendants prevented UCAR access to that data, thereby directly interfering with it. And to the

27 ⁸ Defendants’ reliance on *Silvaco Data Systems v. Intel Corp.*, 184 Cal. App. 4th 210 (2010) in
28 this respect is particularly misplaced. In *Silvaco*, the Court held that the UCL claim was *not*
superseded by the CUTSA claim because, although the facts overlapped, the facts used for
each theory of liability differed. *See id.*, at 241-42.

1 extent Defendants retain their own copies of UCAR information on other media (which is pled in
2 the Complaint and is the subject of discovery), that also constitutes conversion. Therefore, the
3 conversion claim is well-pled and not subject to dismissal.

4 **D. The Complaint Properly Pleads a Claim Under the Computer Fraud and Abuse**
5 **Act**

6 UCAR has alleged two fraud-related claims under federal and state law. To prove a
7 violation of the federal Computer Fraud and Abuse Act, which is codified at 18 U.S.C. § 1030. A
8 person violates this law by “knowingly and with intent to defraud, accesses a protected computer
9 without authorization, or exceeds authorized access, and by means of such conduct furthers the
10 intended fraud and obtains anything of value.” *Id.* § 1030(a)(4). “Any person who suffers damage
11 or loss by reason of a violation of this section may maintain a civil action against the violator to
12 obtain compensatory damages and injunctive relief or other equitable relief.” *Id.* § 1030(g). Here,
13 there are multiple reasons Defendants are liable for federal law violations. They destroyed the
14 information on their UCAR laptop computers without authorization to do so, thereby depriving the
15 company of that information. (Complaint, ¶ 1, 30, 77.) They denied UCAR administrative access to
16 the AWS server. (*Id.*, ¶¶ 23, 64, 92.) They took UCAR’s trade secrets and proprietary information
17 with them, and when confronted with the accusation that they were going to use it at the new
18 company, they did not dispute the fact. (*Id.*, 31.) They had the only administrative rights to the
19 protected database, which may allow them continued access without authorization. (*Id.*, ¶¶ 1, 23,
20 64, 92.) Each of these constitutes an actionable violation of the Computer Fraud and Abuse Act.

21 Defendants admitted that they accessed UCAR computers and took data after they resigned
22 and therefore had no authority to continue to access data from UCAR. *See* 18 U.S.C. § 1030.
23 Defendants’ citation to *United States v. Nosal*, 844 F.3d 1038 (9th Cir. 2016) does not help their
24 cause. There the Court held that accessing a former employer’s computer after leaving was a
25 violation of the Computer Fraud and Abuse Act (CFAA), upholding a criminal conviction of the
26 defendant who engaged in the unauthorized access. *Id.*, at 1029; *see also LVRC Holdings LLC v.*
27 *Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009) (former employee’s log-in to company computer to
28 download files was a violation of CFAA).

Defendants respond by disputing the allegations of the Complaint and arguing the facts,

1 which they may not do on a motion to dismiss. *See Ritchie*, 342 F.3d at 908-09 (cannot rely on facts
2 about events in declarations to dismiss a complaint). All pleadings must be accepted as true, and all
3 inferences must be made in the plaintiff's favor. *Manzarek*, 519 F.3d at 1031.

4 Yan Li has admitted under oath that after he terminated his employment, he accessed the
5 servers and downloaded files, including UCAR confidential information. (Li Dec. [Dkt. 31-1, ¶¶
6 133-139]; Holland Dec. [Dkt. 31-23, ¶¶ 15-21 & Ex. 2].) The files themselves, according to
7 Defendants' own forensic report, show both UCAR proprietary database files and source code. (*Id.*)
8 Then, although Li denies it, the same forensic report shows that he downloaded more files the
9 following day, at a time even he admits he was not authorized to do so. (*Id.*) UCAR's own review of
10 its files shows that he accessed another server on at least a third occasion. (Dkt. 31-23 Ex. 2, Dkt.
11 34-5, ¶ 15 & Dkt. 35-3 – 35-9.) None of this was authorized, and Defendants do not pretend that it
12 was. Under *Nosal*, this activity is actionable under the CFAA.⁹ These facts were determined after
13 the filing of the Complaint, but are fairly noticed by the allegations in the Complaint in support of
14 this claim. (*See, e.g.*, Complaint, ¶¶ 1, 27-32, 56-60.)

15 Instead of taking issue with the evidence, Defendants take issue with the allegations of the
16 Complaint, asserting that they are not worded as strongly as the subsequent evidence produced by
17 both sides has showed. First, the allegations are broad enough to encompass the behavior. Second,
18 complaints are based on notice pleading. The Court may take into consideration the subsequent
19 evidence in the case as providing further support for more general allegations. *Accord ESG Capital*
20 *Partners, LP v. Stratos*, 828 F.3d 1023, 1032 (9th Cir. 2016) (other than fraud, pleadings must only
21 meet "minimal notice pleading requirements").

22
23
24 ⁹ In this way the facts are dissimilar to *Ewiz Express Corp. v. Ma Labs, Inc.*, 2015 WL
25 5680904, *7 (N.D. Cal. Sept. 28, 2015). Unlike that case, here not only does the Complaint
26 allege unauthorized access, the Court has received actual evidence of computer logs and
27 forensic reports regarding Defendants' computer that proves at least three times after they
28 terminated their employment that Defendants accessed UCAR servers, and shows that they
acquired more than 9,000 files doing so (and even shows which files). *Ewiz* is inapposite.
Defendants attempt to avoid liability by asserting that Defendants were paid through March 15,
2017, but they admit that they resigned on the morning of March 14 after which they no longer
worked for UCAR. Moreover, their own forensic report shows download activity on March
16. Additionally, they are again arguing the facts, which is inappropriate on a motion to
dismiss.

E. The Complaint Properly Pleads a Claim for State Common Law Fraud

Additionally, state law fraud applies here. Proof of fraud has four elements: “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, (2007) 157 Cal.App.4th 835, 845 (2007); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 974 (1997). Here, Defendants started courting investment while they were still working at UCAR. Before they left, they told UCAR’s COO that they were obtaining at least \$10 million in investment to leave UCAR and start a competing venture. They made preparations to leave and take UCAR’s trade secret and proprietary information, including their own work product, with them. They concealed this information from UCAR and continued to represent that they were working for UCAR when they had really begun working for their own competing venture, which is further evinced by the fact that they left and destroyed the data on their laptops on the way out. (Complaint, ¶¶ 1, 30, 77, 84-90.) UCAR would not have continued to pay the Defendants and provide them ongoing access to its trade secret and proprietary data if Defendants had told the truth. (*Id.*, ¶ 88.) These facts are all pled in the complaint.

In response, Defendants assert that the claim is not specific enough under Federal Rule of Civil Procedure 9(b). But the facts pled are specific. The employment contract was at-will, meaning it was renewed paycheck to paycheck. (Complaint, ¶¶ 15-19; Zhang TRO Dec. [6-3], Exs. 1-4.) By continuing to take UCAR’s money, each Defendant maintained and renewed his or her initial promise to UCAR. By maintaining this affirmative representation when it was no longer true, and by concealing and failing to disclose that they no longer had any intention of providing UCAR with value for that money, knowing that UCAR was only paying them because they had represented that they were going to provide value to UCAR, each Defendant committed fraud under California state law. (Complaint, ¶¶ 84-88.) As each Defendant is alleged to owe a fiduciary duty (Complaint, ¶¶ 22, 92), that duty also includes the duty not to conceal or fail to disclose material information, and the failure to do so further supports a California common law fraud claim. *See OCM*, at 845; *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735 (1963). No more is required to be pled.

F. The Complaint Properly Pleads a Claim for Breach of Fiduciary Duty

Defendants properly recite the elements of a claim for fiduciary duty but then again improperly attempt to dispute the facts. In California, a claim for breach of fiduciary duty has three elements: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995). Facts are alleged in the Complaint and attested to in declarations supporting each of the elements.

Defendants were entrusted with a high degree of autonomy and responsibility. (Complaint, ¶¶ 22; Qian TRO Dec. [Dkt. 6-4], ¶ 4.) They each signed an agreement that included a duty of loyalty. (Complaint, ¶¶ 15-19; Zhang TRO Dec. [6-3], Exs. 1-4.) UCAR depended on Defendants' loyalty and not to abuse their positions. Yan Li admitted that he signed papers setting out his responsibilities as the only director of UCAR Technology (USA), Inc. (Li Dec. [Dkt. 31-1], ¶¶ 31-39 & Ex. G.) He makes the excuse that he did not fully understand the legal importance of the papers, but, per his own declaration, he was not coerced. He voluntarily undertook special fiduciary duties. *Accord Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327, 345 (Cal. 1966) (corporate director owes a fiduciary duty to the company). But then Yan Li admits he destroyed company information and downloaded 9,200 additional files for use in a competing venture. The other Defendants admit they also took company confidential information to use at a competing venture despite the responsibility and duty of loyalty they undertook. Clearly, UCAR has met its pleading burden for this claim. *Accord Graham-Sult v. Clainos*, 738 F.3d 1131, 1143 (9th Cir. 2013) (breach of fiduciary duty occurs under California law when defendant has duty and breaches it to the detriment of the plaintiff). Defendants "were trusted agents who had fiduciary duties to Plaintiffs Defendants breached that [fiduciary] duty by misappropriating Plaintiffs' trade secrets." *PQ Labs, Inc. v. Yang Qi*, 2014 U.S. Dist. LEXIS 139342, *27 (N.D. Cal. Aug. 23, 2013).

Defendants argue that there is not showing of fiduciary duty, but that is belied by the allegations and subsequent submitted testimony. Defendants state that mere employment relationship does not give rise to fiduciary duty, but the Complaint pleads far more. It pleads that each Defendant was part of a discrete and autonomous R&D group, that they specifically contracted to give the employer a duty of loyalty, and that they had broad authority and control over their work

and were entrusted with a high degree of autonomy by UCAR, who relied on their fiduciary roles instead of providing detailed oversight. (Complaint, ¶¶ 1, 15-27, 92.) Similarly, Defendants citation to *MH Pillars Ltd. v. Realini*, 2017 U.S. Dist. LEXIS 33450 (N.D. Cal. Mar. 8, 2017) is inapposite. In that case, there was literally one paragraph that simply stated that officers and controlling shareholders owe fiduciary duties without providing any grounds for how the defendants were entrusted as fiduciaries. Here, the Complaint (and subsequently provided declarations) show how Defendants were entrusted as fiduciaries and how they voluntarily undertook those duties. (Complaint, ¶¶ 1, 15-27, 92; Qian TRO Dec. [Dkt. 6-4], ¶¶ 3-8 Qian PI Dec. [Dkt. 34-1], ¶¶ 3-7.) Defendants' own declarations, replete with statements about how they were left to conduct their own research, is further support. And Yan Li was not simply an officer, he was the *sole director* of the company. (Complaint, ¶ 22.) The fact that he was left to run his own team shows that his role was not simply nominal.¹⁰

G. The Complaint Properly Pleads a Claim for Breach of Contract

Defendants all had signed employment agreements with contractual provisions that they would not work for the benefit of others. (Complaint, ¶¶ 1, 15-18; Ex. 1-4 to Dkt. 6-3.) Each agreement also included a duty of loyalty. *Id.* Defendants further ignore that, by the very nature of their employment as researchers for a dedicated R&D unit, they were creating trade secret work product. (Complaint, ¶¶ 1, 15-27, 92; Qian TRO Dec. [Dkt. 6-4], ¶¶ 3-8 Qian PI Dec. [Dkt. 34-1], ¶¶ 3-7.) This is not just about "non-trade secret skills" acquired at UCAR.

Additionally, Defendants' general statement that they did not do any work to help the startup prior to leaving UCAR is belied by the fact that prior to their departure (and allegedly before they were offered employment by Xu Han), they indicated they had \$10 million of financing for the venture. (Complaint, ¶ 31; Qian TRO Dec. [Dkt. 6-4], ¶¶ 9-10.) Yan Li also testified that he had communications about joining the startup competitor in February and March 2017 before resigning from UCAR. (Li Dec., ¶¶ 86-87.) The only reason UCAR's COO flew to the United States was because on March 12, Yan Li's team had announced their intention to leave to go to such a startup

¹⁰ Defendants go so far as to argue that Yan Li could not be a fiduciary because he did not authorize the lawsuit to be filed against himself. Obviously, that is not a requirement for pleading fiduciary duty, and the case cited by Defendants (*Zoumboulakis v. McGinn*, 148 F. Supp. 3d 920, 925 (N.D. Cal. 2015)) says no such thing.

(Qian TRO Dec. [6-4], ¶ 9), which shows a complete lack of credibility to Xu Han's statement that he did not offer Defendants employment until March 13. Knowing that he was leaving UCAR for a competitor, Yan Li and the other Defendants downloaded and took UCAR files to use. When UCAR's attorney demanded that Defendants return the property to UCAR, Yan Li instead attempted to cover up his misdeed by destroying the evidence. None of the Defendants returned any property to UCAR until after the complaint was filed, the TRO issued, and they responded to the OSC. (Harkins PI Dec. [Dkt. 34-4], Ex. 1.) There are still multiple storage media that have not been returned. (Holland Dec. [Dkt. 31-23], ¶ 12.)

By leaving UCAR in a state of disarray without the stored data on the laptops and without any information showing the state of the work they had been performing as an autonomous R&D team, Defendants also frustrated the purpose of their employment contracts. (Complaint, ¶ 1, 30, 64, 69, 77; Qian PI Dec. [Dkt. 34-1], ¶¶4, 6.) This is a further breach of contract, as well as breach of the covenant of good faith and fair dealing. *See Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 36 (Cal. 1995) (covenant exists to prevent one contracting party from unfairly frustrating the other party's benefits of the agreement).

Defendants only argument as to the breach of contract claim is that they have asserted a defense and counterclaim against UCAR for breaching the contract. A defense for which Defendants carry the burden of proof is by its very nature based on facts beyond the Complaint and therefore cannot be used to dismiss UCAR's claim for breach of contract. The Complaint specifically pleads that UCAR met all its obligations under the contracts (Complaint, ¶ 63). Again, Defendants inappropriately base their motion on disputed facts they know cannot support a motion to dismiss. Additionally, Defendants mislead the Court in asserting the contracts were breached regarding stock options. The contracts provide salary as a matter of right, but clearly state that any stock options are "[s]ubject to the approval of the Company's Board of Directors" and therefore not guaranteed in the contracts.¹¹ Defendants' argument to dismiss this claim is made in bad faith.

¹¹ Defendants admit this in their motion at page 19 n. 23. However, they then make the unsupported argument that Yan Li could have approved his own stock options. But in the counterclaims filed simultaneously with the motion to dismiss, Defendants assert that the stock options were not to be for the company Yan Li was director of, but instead of a UCAR entity that was publicly traded, which UCAR (USA) Technology Inc. was not. Defendants contradict themselves in their pleadings.

H. The Complaint Properly Pleads a Claim for Breach of the Covenant of Good Faith and Fair Dealing

Here, there is no dispute that Defendants were each employed by UCAR until they abruptly resigned. (*See, e.g.*, Complaint, ¶¶ 1, 30-31.) Their employment agreements included a duty of loyalty and an agreement not to do outside work or work for the benefit of others. (*Id.*, ¶¶ 15-19, 67.) But they performed work on the auto-pilot project for the benefit of their own new venture to compete with UCAR. (*Id.*, 27-28, 30-32, 64, 67-70.) They did this with confidential data and work product they gained from or created for UCAR, and this was a clear violation of their employment agreement. (*Id.*)

Additionally, the covenant of good faith and fair dealing, implied by law, exists to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement made. *See Waller*, 11 Cal. 4th at 36. Every employment agreement also includes the provision that everything acquired by the employee except compensation belongs to the employer. Cal. Labor Code, § 2860. UCAR would be fundamentally deprived of the very basis of the employment agreement if Defendants could conduct R&D work only to take it with them and deprive UCAR of it. The facts as pled properly support this claim.

Defendants' motion is based on the notion that in California, the tort of breach of the covenant of good faith and fair dealing arises in the context of a "special relationship" with "fiduciary characteristics." *See, e.g., Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002). Here, UCAR has pled exactly that—Defendants undertook special relationships with UCAR as an autonomous R&D team that had fiduciary characteristics and were, in fact, fiduciary relationships. (Complaint, ¶¶ 1, 22, 92.) There is no basis to dismiss this claim.

Defendants also assert that the Complaint fails to identify the provisions that were frustrated, but that is not true. The Complaint specifically sets out that the contracts were frustrated in their provisions including the "outside activities" provision that each Defendant would not "engage in any other employment, consulting or other business activity" and would not "assist any person or entity in competing with the Company," as well as the agreement to exhibit loyalty to the company and maintain standards of professionalism, honesty, and reliability. (Complaint, ¶¶ 1, 22, 92.) It was also made clear by UCAR to each Defendant that those duties encompassed a duty to

maintain company R&D as confidential and proprietary. Thus, the Complaint properly pleads a breach of this covenant.

I. The Complaint Properly Pleads a Claim for Unfair Competition

Under California’s Unfair Competition Law, “[a]ny person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.” Cal. Bus. & Prof. Code § 17203. The word “unfair” in Section 17200 reaches any conduct that significantly threatens or harms competition, even conduct not specifically prohibited by some other law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). “Unfair competition” is defined, in part, as “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “Unlawful” practices are those prohibited by law, whether civil or criminal; “unfair” practices are those whereby harm to the victim outweighs its benefits; and “fraudulent” practices only require that the public is deemed likely to be deceived. *See Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994).

Defendants’ use of UCAR proprietary data, their theft of the work product created by Defendants while employed at UCAR, and their work on any non-UCAR auto-pilot project based on UCAR proprietary information, clearly violate each of the three separate prongs for finding a violation of California’s Unfair Competition Law. Moreover, as pled in the Complaint, Defendants deceived UCAR by continuing to “work” for UCAR and collect salary while secretly obtaining outside funding commitments and planning to leave and take UCAR property to start a competing venture. (Complaint, ¶¶ 1, 27-30, 84-87.)

As with the conversion claim, Defendants assert that this claim is preempted by CUTSA. However, the unfair competition claim is not preempted, because UCAR has a right to such claims based on claims other than state trade secret law. *See, e.g., PQ Labs, Inc. v. Yang Qi*, 2014 U.S. Dist. LEXIS 139342, *29-*31 (N.D. Cal. Aug. 23, 2013) (in trade secret case, unfair competition claim properly based on other asserted claims). The UCL claim can be based on facts outside the CUTSA claim, including the claims for conversion, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, fraud, violation of the CFAA, or violation of the DTSA.

V. WERE THE COURT TO FIND ANY CLAIM INSUFFICIENTLY PLED, IT SHOULD GRANT LEAVE TO AMEND

The Federal Rules of Civil Procedure provide that the Court should “freely give leave [to amend] when justice so requires.” Fed.R.Civ.P. 15(a)(2). The Ninth Circuit, and the district courts within the Ninth Circuit, apply this policy favoring amendment be applied with “extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Accordingly, UCAR should be granted leave to amend, if necessary. While it is unclear what the particular deficiency in pleading might be, under each claim above, UCAR has provided facts beyond the allegations in the Complaint that further support those claims. Additionally, since the filing of the Complaint, the parties have submitted more detailed statements of fact and admissions by Defendants that would further support the claims asserted in the Complaint. As such, amendment would not be futile, and leave to amend should be granted, were the Court to grant Defendants’ motion as to any of the claims. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996) (where motion to dismiss granted, court should grant leave to amend unless clear that deficiencies in complaint cannot be cured by any amendment).

VI. CONCLUSION

In the Complaint, UCAR has properly pled facts that support its asserted claims. For the above reasons, UCAR respectfully requests that the Court deny Defendants’ motion in its entirety.

Dated: May 25, 2017

RUYAKCHERIAN LLP

/s/ Robert Harkins
Robert Harkins

Attorneys for Plaintiffs UCAR TECHNOLOGY
(USA) INC., and UCAR INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 25th day of May, 2017, with a copy of this document via the Court's EM/ECF system. Any other counsel of record will be served by electronic mail, facsimile and/or first class mail on the same date.

/s/ Robert Harkins

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